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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-284

H. LANE MITCHELL,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

RESPONSE OF STATE OF LOUISIANA TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Petitioner has presented in reality only one question for review; that is, whether or not the United States Supreme Court should **create** a new field of **Discovery** in **state criminal** cases.

Petitioner first subdivided this into two different categories:

(1) relating to statements of prosecution witnesses (similar to the application of the Federal Jencks Act), and
(2) to all other areas of Discovery imaginable.

In the second category petitioner includes requests

not only for production of various statements of witnesses but also **interviewers' notes** thereof, federal and state income tax returns of some witnesses and finally names and addresses "of **all persons interviewed** by the prosecution and of **all persons expected to be called**" as witnesses.

STATEMENT OF THE CASE

The Grand Jury of Caddo Parish, Louisiana, in March, 1969, indicted Petitioner, H. Lane Mitchell, in five separate indictments as follows:

82,130 - Theft of $640.60 (cost of kitchen sink, dishwasher and cabinets **installed in Petitioner's home** — paid for in city of Shreveport funds in the fall of 1968);

82,131 - Theft of $18,000.00 "**kickback**" funds paid from the City Treasury to a particular supplier and by him paid to the Petitioner);

82,132 - Theft of $10,500.00 (more "**kickback**" funds paid from the City Treasury and remitted to petitioner Mitchell);

82,133 - Theft of $55,000.00 (more "**kickback**" funds drained from the City Treasury through a supplier back into the hands of the petitioner, H. Lane Mitchell, from 1957 to 1968); and

82,134 - Theft of a truck and semi-trailer, valued at $2,000.00, owned by the City of Shreveport.

Prior to trial on the merits before the jury various preliminary motions were handled and two separate pretrial closed hearings were had in order to perpetuate the testimony of the other two defendants. Both of the two codefendants were in ill health at the time of the indictments and were about 65 years old.

The state granted a severance as to the Petitioner, H. Lane Mitchell. Upon his request, agreed to by the state, all five indicuments against Petitioner were consolidated for trial.

Trial was held in the latter part of October and the early part of November, 1969. The trial jury, by **unanimous** verdicts, found the petitioner guilty of:

Theft of $640.60;
Theft of $18,000.00;
Theft of $10,500.00, and
Theft of $55,000.00,

all of said sums being the property of the city of Shreveport, Caddo Parish, Louisiana. On the fifth and last indictment the trial jury unanimously found the petitioner guilty of a lesser charge, namely, Unauthorized Use of a Movable.

(**None of the stolen funds have been paid back** to the city of Shreveport by Petitioner Mitchell. **After the**

indictments were returned, the petitioner offered to pay first the supplier and then the city for petitioner's estimate of the cost of the kitchen sink, diswasher and cabinets and their installation. But both offers were declined.)

Upon appeal to the Louisiana Supreme Court the convictions of the petitioner on all five indictments were affirmed unanimously. Likewise, by unanimous vote, the Louisiana Supreme Court denied petitioner's application for a rehearing and also his application for a stay order.

Similarly the petitioner's application for a stay order from the United States Supreme Court was denied, first by Justice Black and subsequently by the whole court.

Petitioner's counsel have been able to obtain two reprieves from the Governor of Louisiana but shortly after the last reprieve expired in the latter part of August, 1971, Petitioner Mitchell was taken to the state penitentiary so that his sentence would begin to run.

(The Governor of Louisiana has stated publicly to the news media that after petitioner has served a "token" period of time in the penitentiary, he will see that petitioner is released.)

Petitioner served as a duly elected Commissioner of Public Works of Shreveport, Louisiana, from 1934 to December, 1968. He and one codefendant, Anthony

J. Lucero, Jr., both retired in December, 1968, even though that was in the middle of petitioner's four-year term of office. A. J. Lucero, Jr. worked in that department of the city of Shreveport for more than 40 years.

The other codefendant, Joe Walberg, had been a supplier off and on for many years dealing with Petitioner Mitchell through A. J. Lucero, Jr.

Walberg had also done a great deal of traveling in his sales work and due to his failing health he decided to stop his traveling portion of business. In the latter part of 1967, with the help of A. J. Lucero, Jr., **Walberg obtained** a timekeeper's **job in Petitioner Mitchell's office** in city hall. He stayed in that job a number of months until ill health **forced him to retire** in the latter part of 1968, just **a few weeks before Mitchell and Lucero retired.**

A, J. Lucero, Jr. (the "middleman") was the **long standing trusted employee of Petitioner Mitchell.** He first gave his testimony in pretrial hearings which, at the request of Petitioner Mitchell, were closed hearings. These hearings lasted over many different days and in three consecutive weeks. He was thoroughly examined, **cross-examined and "recross-examined"** in the presence of Petitioner Mitchell.

The same was true as to the other codefendant, Walberg, although his testimony extended only upon portions of two consecutive days.

In spite of all of that, and even though the testimony consisted of several hundred transcribed pages, nevertheless trial defense **counsel** (not present counsel for petitioner) **could not find any prior inconsistent statement** to serve as a foundation for possible discovery under the requirements of Louisiana Law.

A. J. Lucero, Jr. was a key witness because he knew of the operations by and between Petitioner Mitchell and various suppliers. But the suppliers did not know of the operations of the other suppliers.

For example, A. J. Lucero, Jr. knew everything about the operations of Joe Walberg with Petitioner Mitchell. He also **knew all about Mitchell going to Monsour's place of business and ordering** a kitchen sink, dishwasher and cabinets — in the presence of Monsour and A. J. Lucero, Jr. — **to be paid for in city funds.**

But Monsour did not know of the operations of Walberg, and Walberg had absolutely no knowledge of the kitchen sink, dishwasher and cabinets even being procured by Petitioner Mitchell from Monsour (much less as to the cost thereof, including installation, being paid for with city funds).

The same thing would be true relative to the knowledge of A. J. Lucero, Jr. of transactions and **"kickback" money** received by him from other suppliers and by him **delivered to Petitioner Mitchell.** For example, there was no testimony from the supplier himself in the $55,000.00 indictment because that supplier,

Mr. Adair, was dead before the grand jury even returned the indictments.

The state's position, in these cases as shown by the pleadings, **testimony and evidence before the trial jury** and **also as found by the Louisiana Supreme Court,** showed that these thefts were accomplished by means of a common scheme and plan.

As a result of this plan by and **between Petitioner Mitchell and his garage superintendent, A. J. Lucero, Jr.,** invoices were either **fraudulently made** or they were **"padded"** (representing **fictitious** purchases of different items by the city of Shreveport). Then, when the supplier involved received his monthly check from the city of Shreveport, such supplier gave to A. J. Lucero, Jr. **for delivery to Petitioner Mitchell** the **cash sums** of money representing those **false and fictitious purchases.**

Petitioner's counsel (both trial counsel and present attorneys) indicate that the only witnesses testifying before the jury were A. J. Lucero, Jr., the garage superintendent, and three suppliers. But **there were other persons who saw money being delivered by A. J. Lucero, Jr. to Petitioner Mitchell, at the maintenance garage.** These witnesses included the assistant manager of the garage and a salesman for an automotive supply company.

Additionally, other witnesses testified upon various other items, including a certified public accountant, city hall employees and many other persons.

At various stages in the district court trial counsel based a great deal of strategy upon applications for discovery to open the file of the state. The initial attack was in the filing of Motions for Bill of Particulars and for Discovery.

The second and simultaneous attack was the application by petitioner for subpoenas duces tecum upon sundry persons and public officials.

Some of the defense motions ask for statements of **reports** made **by any investigator** concerning at least seventeen named individuals. One of these was even Mr. Adair who had died long before the grand jury even met.

In other words, this was simply a **"blunderbuss"** or **"Mother Hubbard" procedure** making a frank and **open bid for complete pretrial discovery.** In fact, defense counsel candidly admitted during oral arguments that the Motions for Subpoenas Duces Tecum constituted simply another approach seeking access to items of materials that he had been seeking in the previous motion for Bill of Particulars and for Discovery, being **"substantially identical."** (Transcript page 4696).

At the outset it should always be recalled that the State in a criminal case is not required to furnish the defendant the details of **evidence** by which it expects to prove its case.

See: **STATE v. HUNTER,** 250 La. 295, 195 So.2d 273, 275.

STATE v. BARKSDALE, 247 La. 198, 170 So. 2d 374

STATE v. SCOTT, 237 La. 71, 110 So.2d 530

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STATE v. WRIGHT, 254 La. 521, 225 So.2d 201

As petitioner's counsel in all courts have frankly admitted, the **right to Discovery in Louisiana is limited.** The leading case in Louisiana is **State v Hunter** (1967) 250 La. 295, 195 So.2d 273, wherein the Court said:

> "Louisiana was in the vanguard of the states in granting a defendant the right to inspect his written confession before trial. See State v.

Dorsey, supra; State v. Tune, 13 N.J. 203, 98 A2d 881; and 74 Harv.L.Rev 940, 1054. However, **we have steadfastly refused** to broaden this holding into **full pre-trial discovery** of the varied items of evidence in criminal cases. See State v. Johnson, 249 La 950, 192 So2d 135 (oral confession and **statements of witnesses**); State v. Dickson, 248 La 500, 180 So2d 403 (police motion picture of defendant in criminal act); State v. Pailet, 246 La 483, 165 So2d 294 (wire-tap recordings); State v. Bickham, 239 La 1094, 121 So2d 207 (defendant's oral statements); State v. Lea, 226 La 724, 84 So2d 169 (oral confession); State v. Shourds, 224 La 955, 71 So2d 340 (**documents**); State v. Simpson, 216 La 212, 43 So2d 585 (evidence produced at grand jury hearing); State v. Vallery, 214 La 495, 38 So 2d 148 (**statement of prosecuting witness**); and State v. Mattio, 212 La 284, 31 So2d 801 (**police report**).

In State v. Shourds, supra, the Court stated:

> 'It is the settled law of this State that **an accused** in a criminal case **is without right to a pre-trial inspection of the evidence** upon which the prosecution relies for a conviction.'

* * * *

The Louisiana State Law Institute, the official state law revision agency, considered this

> procedural area in its extensive studies leading to the Louisiana Code of Criminal Procedure, recently enacted as Act No. 310 of 1966. The Code embodies revised procedures designed to balance 'the interests of the individual and the state.' **Yet, the Institute refrained from adopting pre-trial discovery for criminal cases.** See, e.g., Art. 484 Comment (a), C. Cr. P. **We also decline to do so.** We hold the view that **no more can be demanded of criminal procedure than that it be carefully designed to free the innocent** and convict the guilty by fair trial within our constitutional framework. (All emphasis supplied.)

In spite of the foregoing court opinions, nevertheless on several occasions, during the trial itself, defense counsel would call upon the court to order the district attorney to state whether or not he had a prior statement of a particular witness, particularly as to A. J. Lucero, Jr. The same trial **judge had already refused** to so order the district attorney during the preliminary examination perpetuating the testimony of Joe Walberg.

In other words, the **defense counsel knew what the court's ruling would be** and the defendant therefore **had the advantage** before the jury **of causing the District attorney to object** to his request and the advantage of the court refusing to order the district attorney to make any answer or disclosure relative thereto.

This was then followed with the customary request by defense counsel to the district attorney himself requesting him to produce such a statement whether the court ordered it or not. This **again gave the defendant the advantage of the district attorney having to object** and the court ruling once more against the defendant's request.

This procedure, which was permissible and as to which the state does not make any complaint, nevertheless, could certainly give rise in the minds of some jurors that possibly the state had something in its possession that it was trying to conceal. But, we emphasize that **the record does not show** one way or the other **whether the state has those many, many items requested** in the Motions for Discovery and the Motions for Subpoena Duces Tecum.

All of this "**fishing expedition**" and **innuendo** was **presented by trial counsel** to the jury and the state supreme court, but **to no avail.**

With respect to statements of prosecution witnesses, counsel for petitioner concede in their brief, as they must, that the decision rendered in **Jencks v. United States**, 353 U.S. 657 and the **Jencks Act,** (18 U.S.C. Section 3500) have never been made applicable to state court criminal prosecutions. It is also further apparent that the broad pretrial discovery procedures of Rule 16 of the Federal Rules of Criminal Procedure have not been adopted by most states, including Louisiana.

As late as 1969, this court in **United States v Augenblick,** 393 U.S. 348, 356 stated:

> ". . . our Jencks decision and the **Jencks Act** were not cast in Constitutional terms. **Palermo v United States,** supra (360 U.S.), at 345, 362. They state rules of evidence governing trials before Federal Tribunals; **we have never extended their principles to State Criminal trials."** (emphasis supplied)

Since the recent **Augenblick** decision, all courts, both state and federal, which have considered the issues presented herein have refused to extend the **Jencks** decision and the **Jencks Act** to the states.

As stated heretofore, no more should be demanded of a criminal procedure than that it be carefully designed to free the innocent and convict the guilty by fair trial within our constitutional framework. The constitutions of the United States and the state of Louisiana require, as they should, that a defendant on trial in a criminal case be confronted by the witnesses against him and be given the right to cross-examine them in order that truth and fairness may result.

These constitutional and judicial mandates requiring that steps be taken to insure the fairness of a criminal trial were fully met in the instant case. As stated heretofore, and as is made evident by the opinion of the Louisiana Supreme Court, petitioner was given the full opportunity to examine, inspect, copy and photograph all departmental documentary evidence

which the state intended to use in the trial of the case to establish petitioner's guilt.

Also, petitioner, prior to trial, was provided the opportunity to cross-examine, **without restriction,** two of the principal witnesses who were expected to testify against him. At the trial on the merits, petitioner was again allowed to cross-examine all witnesses, again without restriction, and had the **advantage** of comparing, **in the presence of the trial jury,** all the testimony given at the pretrial hearings with the testimony given at the trial on the merits.

These circumstances, coupled with the fact that petitioner herein had been the Commissioner of Public Works of the city of Shreveport for many years and knew every single facet of the operation of that department and understood all aspects of requisition, invoicing, and payment procedures used by the city of Shreveport, **gave him every advantage at the trial.**

With all the information and evidence provided to petitioner prior to his trial and at the time thereof, how, then, can he contend that he was not given fair treatment and a fair trial and, particularly, treatment equal to any other person accused of crime in these United States? **We submit that he cannot.**

In brief, petitioner relies upon this court's holding in **Brady v Maryland,** 373 U.S. 83 (1963) and **suggests** that in the instant case there was a suppression of evidence. Petitioner further **suggests** that the Louisiana Supreme Court "conceded that much of the information sought was helpful to the defendant in the

scope of Brady." (page A-10, Petitioner's brief).

In this, petitioner is incorrect. A fair reading of the Louisiana Supreme Court's opinion will make it obvious that the Louisiana court was merely stating that Petitioner had filed a "Brady type" motion which the Louisiana Supreme Court considered in conjunction with the bills of exception reserved by petitioner at the trial below together with the 31 volumes of trial record presented in conjunction with such bills of exception.

After having considered all aspects of the case, the Louisiana Supreme Court ruled that **Brady** was not opposite to the instant case, the Louisiana Supreme Court holding that **there had been no suppression of evidence in the instant prosecution.** The Louisiana Supreme Court felt that **Brady v Maryland** involved suppression of evidence, rather than opening a full field of discovery in state criminal prosecutions. We submit that this Honorable Court did not intend to open such field of discovery in the **Brady** decision. We agree with Justice Harlan speaking in **Giles v Maryland,** 386 U.S. 66, 87 S.Ct. 793 (1967) wherein it was stated (S.Ct. 793, 818, 819, 820):

> "As I understand him, my Brother FORTAS believes that state prosecuting officials are compelled by the Fourteenth Amendment to disclose to defense counsel any information "which is material, generously conceived to the case, including all possible defenses." This would include all information which is "c:on-erative or helpful." This standard would de-

mand markedly broader disclosures than this Court has ever held the Fourteenth Amendment to require. The Court has held since Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, that a State's knowing use of perjured testimony denies a fair trial to the accused. **Mooney** has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Napue v. People of State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217. The standard applied in such cases has been whether the testimony "may have had an effect on the outcome of the trial." Napue v. People of State of Illinois, supra, 360 U.S. at 272, 79 S.Ct. at 1179. These cases were very recently followed and applied in Miller v. Pate, 368 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690. Apart from dicta in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, the Court has never gone further.[9] Nor, in my view, does the Constitution demand more. This standard is well calculated to prevent the kinds of prosecu-

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"[9]. I cannot agree that this Court in **Brady** extended **Mooney** in any fashion. The language in **Brady** upon which my Brother FORTAS relies was quite plainly. "wholly advisory." Brady v. Maryland, supra, 373 U.S. at 92, 83 S.Ct. at 1199 (separate opinion of WHITE, J.)."

> torial misconduct which vitiate the very basis of our adversary system, and yet to provide a firm line which halts short of broad, constitutionally required, discovery rules. It both guarantees the fundamental fairness of state criminal trials, thereby satisfying in full the requirements of the Fourteenth Amendment, and preserves intact the States' ultimate authority for the conduct of their systems of criminal justice. None of these advantages adheres to the standard suggested by my Brother FORTAS. His reasoning must inevitably result in the imposition upon the States through the Constitution of broad discovery rules. Those rules would entirely alter the character and balance of our present systems of criminal justice."

We earnestly submit, and have tried to point out above, that the broad discovery rules sought by petitioner herein should not be forced upon the states, and certainly not under the facts of the instant case. Here, not even the **Jencks** Act itself would have really availed petitioner, insofar as the main issues of the case were concerned.

Petitioner had ample preview of the testimony and was given substantially as much as he would have been afforded under the **Jencks** Act in a federal prosecution, and in some respects, even more.

Numerous cases have been decided by courts throughout the country wherein the application of the

Jencks Act to the states has been rejected and wherein the establishment of broad rules of discovery in state criminal prosecutions have been similarly rejected. See:

Hill v Crouse. 360 Fed. 2d 603 (1966)
Sanders v State. 278 Alabama 453, 179 So.2d 35 (1965):
State v Smith. 431 S.W. 2d. 74 (1968);
People v Bellanca. 20 Mich App. 1, 173 N.W. 2d. 754 (1970):
State v Masvarenas. 80 N.M.App. 74, 451, P.2d (1968): rev'd on other grounds 80 N.M. 537. 548. P.2d 789:
State v Page. 244 A.2d. 258 (1968);
Mabry v State. 40 Ala. App. 129, 110 So.2d 250 (1959):
State v Pikul. 150 Conn. 195, 187, A.2d 442 (1963):
Anderson v State. 239 Ind. 372, 156 N.E.2d, 384 (1959):
State v Hill. 193 Kan. 512, 394 P. 2d, 106 (1964);
McKenzie v State. 236 Md.597, 204, A.2d, 678 (1964):
State v Aubuchon. Mo. 381 S.W., 2d, 807 (1964);
Erving v State. 174 Neb. 90.116 N.W.,2d 7 (1962);
Gaskin v State. 172 Tex. Cr. 7, 353 S.W.,2d, 467 (1961):
State v Robinson. 61 Wash. 2d, 107, 377 P.2d 248. (1962):
State v Kelly. 249 Iowa 1219, 91 N.W.,2d, 562 (1958): and

Anderson v State, 207 Tenn. 486, 341 S.W.,2d, 385 (1960).

We submit that these decisions make it apparent that matters of pretrial discovery are **rules of evidence** (and **not** constitutional matters), the formulation of which should remain in the sound discretion of the state courts and state legislatures. As discussed in **State v Hunter,** supra, the Louisiana State Law Institute, considered the **procedural area** of pretrial discovery, and refrained from adopting such rules.

Although there is no right of discovery in criminal cases in many states and in Louisiana, this does not mean defense counsel is to be universally denied all access to any of the state's evidence. Often the district attorney voluntarily makes such evidence available. However, if the district attorney refuses, and if lack of familiarity with the evidence would **unfairly prejudice** the defense, the trial judge has authority to order the production of physical evidence and other items for defense inspection. The bill of particulars is another device which enables defense counsel to procure information as to the basic nature and ingredients of the state's case. 28 Louisiana Law Review, 427, 428 (1968).

These procedural rules, we submit, maintain our adversary concept of criminal justice, but at the same time insure the defendant a fair and impartial trial. To do more, we submit, will seriously affect our adversary system of criminal justice and will upset the delicate balance which now exists in the protection

of our society from the ravages of crime as well as insuring those accused of crime of fair trial.

It should not be forgotten (although counsel for petitioner would have us do so) that full pretrial discovery in state criminal prosecutions will enable persons who actually commit felonies to invent, fabricate, and manufacture their defenses before trial and determine whether they should introduce any evidence and if so, what kind. **Commonwealth v Caplan,** 411 Pa. 563, 192 A.894 (1963).

(For example, it is apparent that a man who has murdered another human being and is on trial for his life will manufacture his defenses and commit perjury or anything he can do to obtain an acquittal, **for he has nothing to lose.** Such a person in a state court proceeding should not be assisted in such improper endeavors by a full preview of the state's evidence. The accused is entitled to fairness, but surely not an advantage).

In the instant case, petitioner was granted **a fair trial.** He was **given a private preview of testimony** of the other two coindictees who were to be called as witnesses against him. He was furnished all departmental documentary evidence upon which the state was to rely in the prosecution. With all this information available to petitioner, **he was properly able to prepare his defense.** After trial before a jury of his peers, petitioner was convicted, of **all of the crimes charged,** by due process of law in every sense in which that

phrase is mentioned in the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted

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CERTIFICATE

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